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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 393

PHOENIX ASSURANCE COMPANY OF NEW YORK,
Petitioner,

vs.

CITY OF BUCKNER, MISSOURI, BYRON B. CRAIL AND HOUSING AND HOME FINANCE ADMINISTRATOR,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

and

MOTION OF RESPONDENT CITY OF BUCKNER TO ASSESS DAMAGES UNDER RULE 56(4)

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STATEMENT

To correct an inaccuracy, not only in the statement of the case contained in the petition, but also in the "reasons for granting the writ" Respondent City of Buckner points to the fact that the motion to dismiss filed by HHFA (R. 55, 56) states as a ground (Para. 4) that the Administrator is not a necessary party to the action since he has no real interest in the outcome of the litigation as between the plaintiff, the City of Buckner, and the other defendants. Petitioner did not bring up the record to show

what happened to this motion. The answer filed by the Administrator on September 18, 1959 (R. 28, 29, 30), contains the same allegation (Para. 29) as contained in paragraph 4 of the motion to dismiss. The District Court in the memorandum opinion (R. 185) says that at the close of all the evidence the court sustained a motion to dismiss as to the Housing and Home Financing Agency.

The Court of Appeals in its opinion (Petition for Writ of Certiorari A8) passed on the legal liability of the Administrator upon the assumption that he was properly in court and held that his relationship to the City was only that of a lender of Government funds and a purchaser of the City revenue bonds and further that the claim against him was properly dismissed.

ARGUMENT

Countering Petitioner's Reasons for Granting the Writ.

First Reason: The first reason erroneously states that the Court of Appeals affirmed the dismissal as to HHFA because the dismissal was based on the erroneous conclusion that even if the HHFA was doing business in Missouri he could not be sued there and because he was not properly served there.

Reference to the opinion of the Court of Appeals (Petition for Writ A8) does not support petitioner's statement. Also reference to the District Court's opinion (R. 185) impels the conclusion that the motion of the Administrator to dismiss was sustained at the conclusion of all of the evidence and it must have been upon the ground that it was not shown that the Administrator had any interest in the transaction.

Second Reason: The second reason is based upon the false premise that the Court of Appeals held that the Administrator was not properly before the Court and was not properly served. The answer to this question is the same as to first reason.

Third Reason: The third reason is likewise based upon the false premise that the Court of Appeals held that the service on the Administrator was insufficient. Neither the District Court nor the Court of Appeals so held. This fact is supported by the opinion of the Court of Appeals (Petition for Certiorari A8) and by reference to the Administrator's answer, motion to dismiss and finally by the dismissal of the Administrator at the conclusion of all the evidence (R. 185).

Fourth Reason: The fourth reason is in fact a claim of error on the part of the Court of Appeals in its conclusion that no case was made against the Administrator. This reason is not even remotely related to those "special and important reasons" to which reference is made in Rule 19(1) and (1)(b).

This Court, in *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U.S. 498, l.c. 502, said

> "Certiorari is granted only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals."

Also, in *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, the Court said:

> "But this court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants.

'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

The language of the Court of Appeals is pertinent. "The contention of Phoenix that it is entitled to visit its misfortune upon the Housing and Home Administrator has too inadequate a base to merit discussion."

Further, in the statement of the third question of "questions presented" petitioner's position is that a new contract had been entered into between the City and the contractor. The District Court (R. 187) found:

> "It is plaintiff's contention that the City and the defendant Reser entered into a new contract at the time the loan was accepted. Reser seems to have some faint recollection that he signed such an agreement. However, I am unable to find any documents any place in the record containing any such new agreement, and it must be my conclusion that there was no such new agreement ever executed, and that the surety company had no obligation beyond that imposed upon it under the terms and provisions of the original contract."

The petition should be denied.

Respectfully submitted,

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MOTION OF RESPONDENT CITY OF BUCKNER TO ASSESS DAMAGES UNDER RULE 56(4)

The respondent City of Buckner moves the Court to adjudge, to the respondent City of Buckner, reasonable damages because it clearly appears from the petition for writ of certiorari that there is no ground for granting such a writ. The petition for writ in this case is utterly groundless. Petitioner has not pointed to a single case decided by this Court, any of the Courts of Appeals, or the Missouri courts with which the opinion of the Court of Appeals in this case conflicts. The questions raised, in petitioner's "reasons for granting the writ", as to whether the HHFA is amenable to suit, where venue of such a suit lies, and how service of process must be had upon the Administrator, were not even reached by the Court of Appeals which, in its decision affirming the judgment of the District Court, assumed that the Administrator was properly served with process (Petition, A8).

The respondent City of Buckner, therefore, moves the Court to assess a penalty against petitioner and in favor of the City of Buckner in accordance with Rule 56 in the amount of 10% of the judgment or such sum as the Court may deem appropriate.

Respectfully submitted,

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